Supreme Court, U.S.

No. 03-1014 JAN 13 2004

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In The

Supreme Court of the United States

JAMES J. TERRY,

Petitioner,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether every "defect, infirmity, or disorder" which results in a disability is within the statutory scope of disabilities compensable under the veteran's disability compensation provisions of Title 38, United States Code?

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra 1-15) is reported at 340 F.3d 1378 (Fed.Cir. 2003). The opinion of the United States Court of Appeals for Veterans Claims (App., infra 31-33) is reported at No. 99-2167, 2002 WL 1446679 (Vet.App. July 2, 2002).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on August 27, 2003. A petition for rehearing *en banc* was denied on October 23, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

38 U.S.C. § 1110. Basic entitlement

> For disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a preexisting injury suffered or disease contracted in the line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus

disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse or alcohol or drugs.

38 U.S.C. § 1111. Presumption of sound condition

For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled in service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

38 U.S.C. § 1131. Basic entitlement

For disability resulting from personal injury suffered or disease contracted in the line of duty, or for aggravation of a preexisting injury suffered or disease contracted in the line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or

> preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse or alcohol or drugs.

38 U.S.C. § 1153. Aggravation

> A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. § 1701. Definitions

> (1) The term "disability" means a disease, injury, or other physical or mental defect.

38 C.F.R. § 3.303(c). Preservice disabilities noted in service

> There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary. Consequently with notation or discovery during service of such residual conditions (scars; fibrosis of the lungs; atrophies following disease of the central or peripheral nervous system; healed fractures; absent, displaced or resected parts of organs; supernumerary parts; congenital malformations or hemorrhoidal tags or tabs,

> etc.) with no evidence of the pertinent antecedent active disease or injury during service the conclusion must be that they preexisted service. Similarly, manifestation of lesions or symptoms of chronic disease from date of enlistment, or so close thereto that the disease could not have originated in so short a period will establish preservice existence thereof. Conditions of an infectious nature are to be considered with regard to the circumstances of the infection and if manifested in less than the respective incubation periods after reporting for duty, they will be held to have preexisted service. In the field of mental disorder, personality disorder which are characterized by developmental defects or pathological trends in the personality structure manifested by a lifelong pattern of action or behavior, chronic psychoneurosis of long duration or other psychiatric symptomatology shown to have existed prior to service with the same manifestations during service, which were the basis of the service diagnosis, will be accepted as showing preservice origin. Congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of applicable legislation.

STATEMENT OF THE CASE

Mr. Terry applied to the Department of Veterans Affairs for disability compensation because he suffers presbyopia, a condition of the eye. The VA denied the

claim. It relied on a VA regulation at 38 C.F.R. § 3.303(c). The regulation excludes certain disabilities from those for which disability compensation may be awarded, including "refractive error of the eye."

Mr. Terry appealed to the agency's administrative appellate forum, the Board for Veterans' Appeals, but the Board is bound by agency regulations and therefore reached the same result.

Mr. Terry then appealed further, to the United States Court of Appeals for Veterans Claims and then to the United States Court of Appeals for the Federal Circuit. In both those appeals, Mr. Terry challenged the validity of the regulation on which the agency relied. Mr. Terry argued that the regulation is inconsistent with the relevant statutory provisions, 38 U.S.C. §§ 1110, 1111, 1131, and 1153.

Both courts disagreed. They concluded instead that the regulation was a valid exercise of the agency's authority to promulgate regulations, finding it necessary that the agency define "injury or disease" to facilitate its adjudication of claims for disability compensation. It is on exactly that point that Mr. Terry disagrees. He contends that veterans disability compensation is not based on "injury or disease." Instead, he contends, veterans disability compensation is based on "disability" and certain other factors not presently relevant (e.g., active military service and connection of the disability to that service).

REASONS FOR GRANTING THE WRIT

This honorable court should grant this petition because a United States court of appeals has decided an important question of federal law in a way that conflicts with statutory scheme and the decisions of this Court regarding the interpretation of veterans' benefits statutes.

The question of federal law is the interpretation of 38 U.S.C. §§ 1110 and 1131 and 38 C.F.R. § 3.303(c). The court of appeals concluded that Congress did not intend to include "every defect, infirmity, or disorder" within the scope of disabilities compensable under Title 38, United States Code. This conclusion is mistaken because the spectrum of compensable disabilities is not defined by the meaning of the words "injury or disease."

These matters have an enormous impact. About 2.2 million claims for various benefits are filed at the VA annually. William F. Fox, Jr., *The United States Board of Veterans' Appeals: The Unfinished Struggle to Reconcile Speed and Justice During Intra-Agency Review* 68 (c. 2000) (*re* FY 1999). Claims for disability compensation easily constitute the largest component: 92% (15,887) of the appeals disposed by the Board in FY 2002 involved claims for disability compensation. Report of the Chairman, Board of Veterans' Appeals, Fiscal Year 2002 at p. 14 (2003).

Among those claims for disability compensation, generous statutory provisions allow veterans disability compensation for any disability which was incurred during active military service or which, even though pre-existing, was aggravated during active military service. Statutory presumptions help the veteran. Two pertinent here are the presumption of sound condition and the presumption of

aggravation. One who is accepted for service upon the required induction physical is presumed to be in sound medical condition in all respects other than any which are noted upon the records of the induction examination. Similarly, a disability which worsens during active military service is presumed to have been aggravated by active military service unless the contrary is shown. The court of appeals' decision adversely affects every veteran who entered service without knowledge of a preexisting congenital or developmental defect or who was accepted as fit for duty despite such a preexisting condition or where a preexisting condition was not noted at entrance examination. The Secretary's regulation creates a bar to disability compensation which is inconsistent with the overall statutory scheme and the court of appeals' decision to uphold the validity of that regulation perpetuates this mistaken interpretation.

Mr. Terry respectfully notes that issues of statutory or regulatory interpretation of veterans benefits law are not contributed to by courts of appeal other than the court of appeals for the Federal Circuit because it has exclusive jurisdiction over such matters. 38 U.S.C. § 7292(c). As the result of that exclusivity, an interpretation of VA statutes and regulations affecting fundamental issues of entitlement to benefits, does not benefit from the consideration of such matters by the other courts of appeal.

EVERY DEFECT, INFIRMITY, OR DISORDER RESULTING IN DISABILITY IS WITHIN THE SCOPE OF COMPENSABLE DISABILITIES.

Veterans of military service are entitled to various benefits under Title 38 of the United States Code. The

benefit most frequently sought, and the one involved in this appeal, is entitlement to disability compensation. Congress mandates that compensation shall be paid for disabilities resulting from an "injury or disease" which occurred during active military service. Congress did not define "injury or disease." The VA promulgated 38 C.F.R. § 3.303(c) to define those terms, but it limits the scope of those conditions for which compensation would be paid for an "injury or disease" occurring during service. Eligibility for compensation is not limited by the nature of the "injury or disease." The VA's regulation restricts eligibility in cases, like this involving certain preexisting conditions, described in the regulation as "congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency." *See* 38 C.F.R. § 3.303(c). Unfortunately, the courts below upheld the VA's regulation.

The scope of compensable disabilities is not limited by the terms "injury or disease," but rather the separate provisions of the statutory scheme when considered as part of an organic whole, allow for consideration of compensation for *every* "defect, infirmity, or disorder." A more specific definition of "injury or disease" is not necessary to establish a veteran's entitlement to compensation for a resulting disability when the veteran entered service without a "defect, infirmity, or disorder" noted at entrance examination to service. *See* 38 U.S.C. §§ 1110, 1131 and 1111. Congress expressly provided that a preservice "injury or disease" will be presumed to have been aggravated by military service where there was an increase in disability during service unless there is a specific finding that the increase in disability was due to the natural

progression of the preservice "injury or disease." *See* 38 U.S.C. §§ 1110, 1131 and 1153.

The court of appeals misinterpreted 38 U.S.C. §§ 1110 and 1131 with the result that it permitted the agency to limit the scope of compensable disabilities by defining the terms "injury or disease." *Terry v. Principi*, 340 F.3d at 1382. The court of appeals incorrectly relied upon the "ordinary meaning" of the terms "injury or disease." *Terry v. Principi*, 340 F.3d at 1382 and 1383. Without the required consideration for the interplay of §§ 1110 and 1131 with §§ 1111 and 1153, the court of appeals determined that the ordinary meanings of "injury or disease" did not fill the gap left by the statute with respect to what kinds of conditions qualify as "injuries or diseases" for the purposes of entitlement to veterans' benefits. *Terry v. Principi*, 340 F.3d at 1383. The court of appeals was required to have considered the separate provisions of the veterans' benefits statutory scheme as part of an organic whole and given to each as liberal a construction for the benefit of veterans as the harmonious interplay of each separate provision will permit. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946). But it didn't.

Instead, Mr. Terry submits that Congress *did* intend that *every* "defect, infirmity, or disorder" would be within the scope of those conditions for which compensation might be paid for "resulting disabilities," *ceteris parabus*. The court of appeals wrongly focused on the meaning of "injury or disease" when the relevant consideration should have been on the meaning of the term used by Congress in §§ 1110 and 1131 "disability." Congress must be presumed to have knowingly used the terms "defects, infirmities or disorders" in 38 U.S.C. § 1111, when referring to the conditions for which compensation would be paid for

"disabilities." Section 1111 expresses the intent of Congress that it was written "[f]or the purposes of section 1110."

The meaning of statutory language, plain or not, depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991) at 221. The cardinal rule is that a statute is to be read as a whole. *See Massachusetts v. Morash*, 490 U.S. 107, 115 (1989). Congress did define the term "disability" at 38 U.S.C. § 1701(1). Mr. Terry submits that the predicate for entitlement to compensation under 38 U.S.C. §§ 1110 and 1131 is not based upon the definition of the terms "injury or disease" but rather is based upon whether a veteran suffers from *any* "disability." Based upon the definition provided by Congress of "disability," a disability may result from any "disease, injury or other physical or mental defect." *See* 38 U.S.C. § 1701(1).

The special canons of construction for veterans' benefits statutes require the consideration of the harmonious interplay between the statutory provisions with the intent of Congress. Therefore, in determining the scope of those conditions for which compensation will be paid by the United States, it is the meaning of the term "disability" which is dispositive rather than the meaning of the neutral terms of "injury or disease." Congress provided in both § 1111 and § 1701(1), the scope of conditions for which compensation would be paid: "defects, infirmities, or disorders." The term "disability" must be interpreted as being broadly inclusive rather than narrowed and made exclusive by a limiting definition of "injury or disease" tacked on by the agency. A narrow reading of the statutory scheme unreasonably excludes conditions, as in 38 C.F.R. § 3.303(c), from compensation contrary to any intent expressed by Congress.

This Court has previously noted that "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . *NLRB v. Federbush Co.,* 121 F.2d 954, 957 (1941)." *King v. St. Vincent's Hospital*, 502 U.S. at 221. A determination of the meaning "injury or disease" in sections 1110 and 1131 is not required to determine the scope of the conditions for which compensation shall be paid. Both statutes predicate the payment of compensation for "*resulting disabilities*." The intent of these statutes is that compensation will be paid by the government for "*resulting disabilities*," which are referred to by Congress as "defects, infirmities, or disorders" in § 1111 and defined as "disease, injury, or other physical or mental defect" in § 1701(1).

Congress began the text of § 1111 by clearly stating its intention to provide a presumption of sound condition "For the purposes of section 1110." Congress stated that every veteran shall be taken to have been in sound condition when examined for service, "except as to defects, infirmities, or disorders noted at the time of the examination." The intent of Congress, in § 1111 is clear that the presumption of soundness must be applied to those "defects, infirmities, or disorders," not noted as such at the time of the veteran's entrance examination.[1]

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[1] VAOPGCPREC 3-2003 (July 16, 2003) relying upon the legislative history of 38 U.S.C. § 1111, as well as a 1944 opinion of the Solicitor of the Veterans Administration discussing Public Law 78-144, 72 Op. Sol. 298 (Feb. 7, 1944), concluded that § 1111 requires VA to bear the burden of showing the absence of aggravation in order to rebut the

(Continued on following page)

38 U.S.C. § 1111 plainly and unambiguously identifies the conditions to which the presumption of soundness applies as "defects, infirmities, or disorders." The presumption of soundness therefore extends to *every* "defect, infirmity, or disorder" not noted at entry to service. In contrast, 38 U.S.C. § 1153 applies to those conditions noted at entrance to service, which necessarily are conditions which are not subject to the presumption of soundness provided for in 38 U.S.C. § 1111. These conditions are necessarily the same "defects, infirmities, or disorders" referred to in 38 U.S.C. § 1111.

The "harmonious interplay" and a "liberal construction" of 38 U.S.C. §§ 1110, 1111, 1131 and 1153, reveals the intent of Congress to include within the scope of compensable disabilities *every* "defect, infirmity, or disorder." This construction is further supported by the language of 38 U.S.C. § 1153 in which Congress uses the term "disability" and not the terms "injury or disease." Further, it follows that when Congress defined the term "disability" in 38 U.S.C. § 1701(a) to mean a "disease, injury, or other physical or mental defect" that such a definition is consistent with an intent that the scope of disability

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presumption of sound condition. The opinions of the Solicitor of the Veterans Administration and the General Counsel of the Department of Veterans Affairs clearly indicate that it was the intent of Congress in enacting 38 U.S.C. § 1111 and the plain meaning of the language of the statute provides that the presumption of soundness is rebutted *only* if clear and unmistakable evidence establishes both that (1) the condition existed prior to service and (2) the condition was not aggravated by service. These opinions concluded that § 1111 requires the VA to bear the burden of showing the absence of aggravation in order to rebut the presumption of sound condition.

compensation would include *every* "defect, infirmity, or disorder" within the meaning of "disability."

This Court has noted that veterans benefits legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. *See Boone v. Lightner*, 319 U.S. 561, 575 (1943). *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. at 285. *Fishgold* observed that our problem is to construe the separate provisions of the Act as parts of an organic whole and give *each* as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits. *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. at 285. (emphasis added) *Fishgold* reviewed a statute designed "to protect the veteran in several ways." *Fishgold*, 328 U.S. at 284. The interpretation made by the Secretary in 38 C.F.R. § 3.303(c) and affirmed by the court of appeals, to *exclude* certain "injuries or diseases" from disabilities for which compensation will be paid is inconsistent with the organic whole and a liberal construction for the benefit of the veteran of the harmonious interplay of the separate statutory provisions.

The decision of the court of appeals did not construe the separate provisions of the complete statutory scheme as part of an organic *whole* and did not give to *each* as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits. Instead, the court of appeals did as the Secretary had done in promulgating 38 C.F.R. § 3.303(c): it provided a narrow construction which discounted the interplay of the separate statutory provisions.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals
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02-7416

JAMES J. TERRY,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

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Appealed from: United States Court of Appeals for Veterans Claims

Judge Jonathan R. Steinberg

DECIDED August 27, 2003

Before NEWMAN, CLEVENGER, and SCHALL, *Circuit Judge.*

SCHALL, *Circuit Judge.*

James J. Terry is a veteran of the United States Army. In March of 1996, he filed a claim with the Department of

Veterans Affairs ("VA") Regional Office ("RO") in Muskogee, Oklahoma, seeking compensation for service-connected presbyopia, a condition of the eye. The RO denied the claim and the Board of Veterans' Appeals ("Board") affirmed. *Terry v. Principi,* No. SS 073 36 5238 (B.V.A. Sept. 30, 1999). In sustaining the RO's decision, the Board held that 38 C.F.R. § 3.303(c) barred Mr. Terry's claim.[1] *Id.* The United States Court of Appeals for Veterans Claims ("Veterans Court") affirmed the Board's decision, rejecting Mr. Terry's challenge to the validity of 38 C.F.R. § 3.303(c). *Terry v. Principi,* No. 99-2167, slip. op. at 2-3 (Vet. App. July 2, 2002). In so doing, the court relied upon its previous decision in *Winn v. Brown,* 8 Vet. App. 510 (1996). *Id.* Mr. Terry now appeals the court's decision. We hold that 38 C.F.R. § 3.303(c) is valid and precludes Mr. Terry's claim for compensation for presbyopia. Accordingly, we affirm the Veterans Court's decision.

BACKGROUND

I. Factual Background

Mr. Terry served on active duty in the Army from December of 1974 to May of 1983. When he entered the Army, he underwent a medical enlistment examination. No defect was noted in his vision at that time, nor were any visual defects noted in an examination performed in 1979. However, Mr. Terry's service medical records do reveal a diagnosis of central serous retinopathy of the left

[1] All references are to statutes as set forth in the 2000 version of the United States Code and to regulations as set forth in the 2002 version of the Code of Federal Regulations.

eye.[2] In May of 1996, Mr. Terry's eyes were examined at the VA Medical Center in Oklahoma City, Oklahoma. The examiner diagnosed Mr. Terry with presbyopia. As explained below, presbyopia is a "refractive error of the eye" that develops with age.

II. Procedural History

In March of 1996, Mr. Terry filed a claim for service connection for his presbyopia with the RO in Muskogee, Oklahoma. The RO denied the claim on the ground that the evidence failed to show a disability for which service connection could be established. *See Terry,* No. SS 073 36 5238, slip op. at 2. The Board affirmed the RO's denial of the claim. *Id.* at 9. The Board determined that presbyopia "is a refractive error of the eye, which is a constitutional or developmental abnormality, and is not a disability under VA law."[3] *Id.* at 7. The Board concluded that 38 C.F.R. § 3.303(c) was a bar to Mr. Terry's claim for service connection for presbyopia because the regulation provides that "refractive error of the eye" is not a disease or injury within the meaning of veterans' benefits statutes. *Id.* at 9. The Board therefore held that Mr. Terry was not entitled to compensation for the condition. *Id.*

The Veterans Court subsequently affirmed the Board's decision. *Terry,* No. 99-2167, slip. op. at 3. In so doing, the court rejected Mr. Terry's challenge to the validity of 38

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[2] Central serous retinopathy is localized detachment of the neural retina. *Dorland's Illustrated Medical Dictionary* 1567 (29th ed. 2000).

[3] We do not review, and the parties do not challenge, the Board's determination that presbyopia is a "refractive error of the eye."

C.F.R. § 3.303(c) by relying upon *Winn v. Brown,* 8 Vet. App. 510 (1996). *Id.* at 2-3. In *Winn,* the court upheld the validity of section 3.303(c) in the face of a challenge by a veteran with a personality disorder. *Winn,* 8 Vet. App. at 515-16. Mr. Terry now appeals the decision of the Veterans Court upholding 38 C.F.R. § 3.303(c) and affirming the denial of his claim. On appeal, Mr. Terry urges that section 3.303(c) is invalid as applied to his claim for service connection for presbyopia.

ANALYSIS

I. Jurisdiction and Standard of Review

Our jurisdiction to review decisions of the Veterans Court is limited by statute. 38 U.S.C. § 7292; *Forshey v. Principi,* 284 F.3d 1335, 1338 (Fed. Cir. 2002) (*en banc*). We have "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under [section 7292], and to interpret constitutional and statutory provisions to the extent presented and necessary to a decision." 38 U.S.C. § 7292(c). Our authority extends to deciding all relevant questions of law and we can set aside a regulation or an interpretation of a regulation relied upon by the Court of Appeals for Veterans Claims when we find it to be "arbitrary, capricious, and an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations; or in violation of a statutory right; or without observance of procedure required by law." *Jones v. West,* 194 F.3d 1345, 1349 (Fed. Cir. 1999); *see* 38 U.S.C. § 7292(d)(1). Our authority does not extend to the ability to review factual determinations or the application of a law or regulation to

a particular set of facts, unless a constitutional issue is presented. 38 U.S.C. § 7292(d)(2). No factual issues are presented in this case. The sole issue on appeal is Mr. Terry's challenge to the validity of 38 C.F.R. § 3.303(c). Because Mr. Terry challenges the validity of a regulation, we have jurisdiction pursuant to 38 U.S.C. § 7292. The Veterans Court's rejection of that challenge presents an issue of law that we review *de novo. Santana-Venegas v. Principi,* 314 F.3d 1293, 1296 (Fed. Cir. 2002).

II. Mr. Terry's Challenge to the Validity of 38 C.F.R. § 3.303(c)

On appeal, Mr. Terry argues that, to the extent it prohibits compensation for "refractive error of the eye" and, in particular, for presbyopia, 38 C.F.R. § 3.303(c) is contrary to 38 U.S.C. §§ 1110, 1111, 1131, and 1153. According to Mr. Terry, the VA Secretary exceeded his authority under those statutes by promulgating section 3.303(c) to exclude visual "refractive error of the eye" from disabilities for which compensation is payable. He urges us to invalidate that portion of the regulation. The government responds that the VA's interpretation of sections 1110, 1111, 1131, and 1153, as embodied in 38 C.F.R. § 3.303(c), should be given deference as a permissible interpretation of the statutes by the agency charged with their implementation. The government urges us to uphold the validity of the regulation.

In reviewing an agency's construction of a statute that it administers, we address two questions, as required by the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 842-43 (1984). The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842.

If so, this court and the agency "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If, however, Congress has not spoken directly to the issue or if the statute is ambiguous with regard to that issue, this court addresses the second question of whether the responsible agency has rendered an interpretation that "is based on a permissible construction of the statute." *Id.*

We begin with the statutory language. *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756 (1975) (The "starting point in every case involving construction of a statute is the language itself."). Sections 1110 and 1131 of Title 38 of the United States Code authorize the Secretary of Veterans Affairs to provide compensation to a veteran for disabilities that result from injuries or diseases that occur in the line of duty during times of war and during times of peace, respectively. Section 1110 provides as follows:

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter [38 USCS §§ 1110 et seq.], but no compensation shall be paid if the

> disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 U.S.C. § 1110.[4]

Sections 1110 and 1131 make it clear that if a disability cannot be attributed to an "injury" or a "disease" incurred or aggravated in the line of duty, the disability is not compensable. We therefore must consider the meaning of the terms "injury" and "disease" to determine Congress' intent with respect to the scope of compensable disabilities. These terms are not defined in Title 38. Thus, Congress has not directly spoken to the precise question at issue; nor has Congress specifically prohibited any particular definition of "injury" and "disease."[5] *See Chevron,* 467 U.S. at 843. In the absence of an express definition, we presume that Congress intended to give these words their

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[4] Section 1131 authorizes compensation for disabilities incurred during times of peace. It provides as follows:

> For disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, in the active military, naval, or air service, during other than a period of war, the United States will pay to any veteran thus disabled and who was discharged or released under conditions other than dishonorable from the period of service in which said injury or disease was incurred, or preexisting injury or disease was aggravated, compensation as provided in this subchapter, but no compensation shall be paid if the disability is a result of the veteran's own willful misconduct or abuse of alcohol or drugs.

38 U.S.C. § 1131.

[5] Title 38 does define the term "chronic disease" in 38 U.S.C. § 1101. However, the statutes at issue in this case do not use that term.

ordinary meanings. *Asgrow Seeds Co. v. Winterboer,* 513 U.S. 179, 187 (1995).

Dorland's Illustrated Medical Dictionary defines the term "injury" as "harm or hurt; usually applied to damage inflicted on the body by an external force." *Dorland's Illustrated Medical Dictionary* 901 (29th ed. 2000). It defines the term "disease" as "any deviation from or interruption of the normal structure or function of a part, organ, or system of the body as manifested by characteristic symptoms and signs; the etiology, pathology, and prognosis may be known or unknown." *Id.* at 511. These definitions do not render the statute ambiguous. Consequently, we are not faced with the situation in which statutory language gives rise to interpretive doubt that must be resolved in favor of the veteran. *See Brown v. Gardner,* 513 U.S. 115, 118 (1994). At the same time, however, these definitions do not fill the gap left by the statute with respect to the question of what kinds of conditions qualify as injuries or diseases for purposes of entitlement to veterans' benefits. Congress made it clear that the agency was to fill the gap left by the statute. Pursuant to 38 U.S.C. § 501(a), the Secretary of Veterans Affairs is authorized to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws." 38 U.S.C. § 501(a). Under these circumstances, the foregoing definitions of "injury" and "disease" serve as a framework within which we determine whether the Secretary has rendered an interpretation that "is based on a permissible construction of the statute." *Chevron,* 467 U.S. at 843.

When Congress leaves room for agency interpretation or expressly delegates policy making authority to the

Secretary, the scope of judicial review is limited. *Pauley v. BethEnergy Mines,* 501 U.S. 680, 696 (1991). Thus, we must decide "(1) whether the statute unambiguously forbids the Agency's interpretation, and, if not, (2) whether the interpretation for other reasons, exceeds the bounds of the permissible." *Barnhart v. Walton,* 535 U.S. 212, 218 (2002). In other words, the Secretary's interpretation will not be set aside unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Chevron,* 467 U.S. at 844. We give substantial deference to the statutory interpretation of an agency authorized to administer a statute. *Id.*

In the challenged regulation, 38 C.F.R. § 3.303(c), the VA excluded certain conditions, including "refractive error of the eye," from the terms "injury" and "disease." Section 3.303(c) states in pertinent part as follows:

> (c) Preservice disabilities noted in service. There are medical principles so universally recognized as to constitute fact (clear and unmistakable proof), and when in accordance with these principles existence of a disability prior to service is established, no additional or confirmatory evidence is necessary . . . Congenital or developmental defects, refractive error of the eye, personality disorders and mental deficiency as such are not diseases or injuries within the meaning of applicable legislation.

38 C.F.R. § 3.303(c). We must determine, therefore, whether this is a permissible construction by the VA of the terms "injury" and "disease" in sections 1110 and 1131.

The VA based its exclusion of "refractive error of the eye" on the fact that refractive errors of the eye, such as presbyopia, are recognized in medical literature as being

constitutional or developmental abnormalities. Presbyopia, in particular, is caused by a physiological change in the accommodation mechanism by which the focus of the eye is adjusted for objects at different distances. Presbyopia is described as "hyperopia and impairment of vision due to advancing years or to old age; it is dependent on diminution of the power of accommodation from loss of elasticity of the crystalline lens, causing the near point of distinct vision to be removed farther from the eye."[6] *Dorland's Illustrated Medical Dictionary, supra,* at 1453. The fact that this condition is due to developmental problems associated with aging rather than due to trauma that was incurred during military service is a reasonable basis for excluding "refractive error of the eye" from the construction of the terms "injury" and "disease." Additionally, this exclusion is consistent with the definitions of "injury" and "disease," which require that the cause of the disability be due to "damage inflicted on the body by an external force," *id.* at 901, or "any deviation from or interruption of the normal structure or function of a part, organ, or system of the body," *id.* at 511. Presbyopia is not due to either infliction, but is due to aging. Aging is not an external force; nor is it a deviation from the normal function of the body. Therefore, the interpretation adopted by the Secretary in section 3.303(c) is not arbitrary, capricious, or manifestly contrary to the statute. We therefore hold that it represents a permissible construction of the statute.

---

[6] Presbyopia manifests itself when one is required to move printed material away from the eyes in order to be able to read it. *See* Daniel Vaugh, M.D., Taylor Asbury, M.D., & Paul Riordan-Eva, FRCS, FRCOphth, *General Ophthalmology* 74 (15th ed. 1999).

Mr. Terry argues, however, that an otherwise reasonable interpretation of a statute by the VA is impermissible if the statute is not liberally construed in favor of the veteran. *See Gardner,* 513 U.S. at 118 (stating that it is a well-established rule of statutory construction that when a statute is ambiguous, "interpretive doubt is to be resolved in the veteran's favor"). The argument is without merit. The principle upon which Mr. Terry relies is a canon of statutory construction that requires that resolution of interpretive doubt arising from statutory language be resolved in favor of the veteran.[7] *Id.* It does not affect the determination of whether an agency's regulation is a permissible construction of a statute. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs,* 260 F.3d 1365, 1378 (Fed. Cir. 2001) ("Ordinarily at this juncture in the analysis – where application of the usual canons of statutory construction [i.e., canon to resolve interpretive doubt in favor of the veteran and canon to consider legislative history] push in opposite directions – we would resort to the Chevron principle, which mandates that we defer to an agency's reasonable interpretation of an ambiguous statute.").

Mr. Terry further argues that 38 U.S.C. §§ 1110 and 1131 should be read in light of the statutory framework of which they are a part, namely 38 U.S.C. §§ 1111 and 1153. If that framework is considered, Mr. Terry urges, it becomes clear that Congress intended that veterans be compensated for any pre-service disability that is aggravated on active duty. When we construe a statute, we do so

[7] As noted above, the language of 38 U.S.C. §§ 1110 & 1131 is not ambiguous. It does not give rise to interpretive doubt.

in the setting of the statutory scheme of which it is a part. *Tyler v. Cain,* 533 U.S. 656, 662 (2001) (stating that "we interpret the words in their context and with a view to their place in the overall statutory scheme") (internal quotation marks omitted). Therefore, we must determine if the VA's interpretation in section 3.303(c) is inconsistent with 38 U.S.C. §§ 1111 & 1153.

Section 1111 of Title 38 relates to the presumption of soundness that applies to all enrollees upon entrance to the military. It provides as follows:

> For the purposes of section 1110 of this title, every veteran shall be taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, infirmities, or disorders noted at the time of the examination, acceptance, and enrollment, or where clear and unmistakable evidence demonstrates that the injury or disease existed before acceptance and enrollment and was not aggravated by such service.

38 U.S.C. § 1111.

Under section 1111, unless a defect, infirmity, or disorder is noted during the induction physical examination, a presumption arises that the veteran's health was sound when he entered the service until the presumption has been rebutted by clear and unmistakable evidence that the injury or disease existed before acceptance and was not aggravated by service. 38 U.S.C. § 1111; *see Harris v. West,* 203 F.3d 1347, 1349 (Fed. Cir. 2000). If the presumption of soundness is properly rebutted, the veteran is not entitled to service-connected disability benefits unless he can show his injury or disease was aggravated by his military service. *Id.*

As noted, no defect, infirmity, or disorder was detected during Mr. Terry's entry examination; therefore, he would typically be entitled to the statutory presumption of sound health, and the Secretary would need to produce clear and unmistakable evidence that his presbyopia preexisted service and was not aggravated by service. However, presbyopia is a condition that would rarely be observed during a medical entrance examination, because it generally develops around age forty, long after anyone enrolls in the military. In 38 C.F.R. § 3.303(c), the VA found that some principles are so well established "as to constitute fact (clear and unmistakeable proof)." 38 C.F.R. § 3.303(c). One such principle, which is based on accepted medical evidence, is that refractive errors of the eye, such as presbyopia, are conditions that are the result of the normal aging process. The normal aging process starts before military service begins. Consequently, the sequence of events that results in refractive error of the eye always precedes military service. It was reasonable for the VA to conclude that the presumption of soundness is always rebutted by the medical evidence with respect to refractive error of the eye and that therefore refractive error of the eye could be reasonably excluded from the terms "injury" and "disease."

Mr. Terry nevertheless contends that Congress' decision to include the phrase "defects, infirmities, and disorders" in section 1111 demonstrates that it intended that the terms "injury" and "disease" be broadly interpreted. This argument is unpersuasive. The Veterans Court logically disposed of it in *Winn,* 8 Vet. App. at 516, and we today follow that decision. In *Winn,* the court faced the issue of whether 38 C.F.R. § 3.303(c) is invalid because it contradicts 38 U.S.C. § 1111. The court stated that,

when sections 1110 and 1111 are read together, "the term 'defect' in section 1111 necessarily means a defect that amounts to or arises from disease or injury." *Winn,* 8 Vet. App. at 516. The court noted that "[i]f the Court accepted the appellant's argument, any defect (in the unlimited sense) not noted during an entry examination or proved preexisting by clear and unmistakable evidence would entitle a veteran to VA compensation." *Id.* The court concluded that it did not believe that Congress intended the terms "injury" and "disease" to be so broadly defined. *Id.* We agree that Congress could not have intended to include every defect, infirmity, and disorder within the scope of compensable disabilities.

Finally, we must determine whether the VA's interpretation in section 3.303(c) is consistent with 38 U.S.C. § 1153. Mr. Terry argues that section 1153 requires that the VA presume that a condition was aggravated by military service if it increased in severity during service unless there is a specific finding that the increase was the natural progression of the condition. We reject this argument. Section 1153 provides as follows:

> A preexisting injury or disease will be considered to have been aggravated by active military, naval, or air service, where there is an increase in disability during such service, unless there is a specific finding that the increase in disability is due to the natural progress of the disease.

38 U.S.C. § 1153. Even if we assume, arguendo, that presbyopia is a preexisting "injury" or "disease" for the purposes of section 1153, the Secretary was reasonable in excluding it in section 3.303(c) because the medical evidence shows that the increase in presbyopia is always "due

to the natural progress of the disease." It results from the normal aging process. Mr. Terry has not provided any contrary evidence suggesting that presbyopia can be caused by or aggravated by events associated with military service, other than aging. Absent any such evidence, we cannot conclude that the Secretary's interpretation of the terms "injury" and "disease" is contrary to 38 U.S.C. § 1153.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals for Veterans Claims is affirmed.

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NOTICE OF ENTRY OF
JUDGMENT ACCOMPANIED BY OPINION

OPINION FILED AND JUDGMENT ENTERED: 08/27/03

The attached opinion announcing the judgment of the court in your case was filed and judgment was entered on the date indicated above. The mandate will be issued in due course.

Information is also provided about petitions for rehearing and petitions for rehearing en banc. The questions and answers are those frequently asked and answered by the Clerk's Office.

Costs are taxed against the Appellant(s) under Rule 39. The party entitled to costs is provided a bill of costs form and an instruction sheet with this notice.

The parties are encouraged to stipulate to the costs. A bill of costs will be presumed correct in the absence of a timely filed objection.

Costs are payable to the party awarded costs. If costs are awarded to the government, they should be paid to the Treasurer of the United States. Where costs are awarded against the government, payment should be made to the person(s) designated under the governing statutes, the court's orders, and the parties' written settlement agreements. In cases between private parties, payment should be made to counsel for the party awarded costs or, if the party is not represented by counsel, to the party pro se. Payment of costs should not be sent to the court. Costs should be paid promptly.

If the court also imposed monetary sanctions, they are payable to the opposing party unless the court's opinion provides otherwise. Sanctions should be paid in the same way as costs.

Regarding exhibits and visual aids: Your attention is directed to FRAP 34(g) which states that the clerk may destroy or dispose of the exhibits if counsel does not reclaim them within a reasonable time after the clerk gives notice to remove them. (The clerk deems a reasonable time to be 15 days from the date the final mandate is issued.

/s/ Jan Horbaly
JAN HORBALY
Clerk

cc: KENNETH M. CARPENTER
MAUREEN A. DELANEY

TERRY V DVA, 02-7416
CVA-99-2197

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

02-7416

JAMES J. TERRY,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI, Secretary of Veterans Affairs,

Respondent-Appellee.

ORDER

(Filed Oct. 23, 2003)

Before NEWMAN, Circuit Judge, CLEVENGER, Circuit Judge, and SCHALL, Circuit Judge.

A petition for rehearing having been filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on October 30, 2003.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: October 23, 2003

cc: KENNETH M. CARPENTER
MAUREEN A. DELANEY

TERRY V DVA, 02-7416
CVA-99-2197

* *

* Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record. *

* *

App. 20

02-7416

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES J. TERRY,

Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
Secretary of Veteran Affairs,

Respondent-Appellee.

APPEAL FROM UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS IN 99-2167
JUDGE JONATHAN R. STEINBERG

APPELLANT'S PETITION FOR REHEARING AND ADDENDUM

KENNETH M. CARPENTER
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Attorney for Appellant,
James J. Terry

October 9, 2003

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 28(a)(1) and 47.4, counsel, Kenneth M. Carpenter, for Claimant-Appellant certifies the following:

1. The full name of every party or amicus represented by me is:

   James J. Terry.

2. The name of the real party in interest represented by me is:

   James J. Terry.

3. The parent companies, subsidiaries and affiliates that have issued shares to the public, of the party or amicus curiae represented by me are:

   None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court of agency or are expected to appear in this Court are:

   Kenneth M. Carpenter
   Carpenter Chartered
   P.O. Box 2099
   Topeka, KS 66601
   (785) 357-5251

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STATEMENT OF COUNSEL

Based on my professional judgment, I believe this matter requires rehearing by the Court because the Court overlooked the definition of the term "disability" in 38 U.S.C. § 1701(1).

Furthermore, in light of this definition, the Court did not construe the separate provisions of the statutory scheme as part of an organic whole and did not give to each as liberal a construction for the benefit of veterans as the harmonious interplay of the separate provisions permit as contemplated by ***Fishgold v. Sullivan Drydock & Repair Corp.***, 328 U.S. 275 (1946).

This Court mistakenly limited the ***Brown v. Gardner***, 513 U.S. 115 (1994), canon of construction to statutory interpretation. ***Gardner*** is not limited to statutory interpretation.

_____

Kenneth M. Carpenter,
Attorney for Appellant,
James J. Terry

02-7416

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JAMES J. TERRY,
Claimant-Appellant,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure and the Federal Circuit Rules, Kenneth M. Carpenter respectfully moves for a rehearing of the August 27, 2003 decision of the Court affirming the decision of the U.S. Court of Claims for Veteran Appeals ("CAVC") in the case of James J. Terry, Vet.App. No. 99-2167.

POINTS OF LAW TO BE CONSIDERED

Appellant respectfully submits that in reaching its August 27, 2003 decision, the Court overlooked the definition of the term "disability" in 38 U.S.C. § 1701(1). The fact that Congress had defined "disability" was noted by the Supreme Court of the United States in ***Brown v. Gardner***, 513 U.S. 115 (1994). The definition of "disability" disposes of the matter at issue and represents an expression of the intent of Congress concerning the meaning of the terms "disease" or "injury."

In Mr. Terry's case, this Court mistakenly limited the ***Gardner*** canon of construction to statutory interpretation. ***Gardner*** is not limited to statutory interpretation. ***Gardner*** reviewed the Secretary's interpretation of the statute, his regulation. 38 C.F.R. § 3.158(c)(3) (1993). ***Gardner***, 513 U.S. at 116.

Furthermore, in light of this definition, this Court did not construe the separate provisions of the statutory scheme as part of an organic whole and did not give to each as liberal a construction for the benefit of veterans as the harmonious interplay of the separate provisions permit as contemplated by ***Fishgold v. Sullivan Drydock & Repair Corp.***, 328 U.S. 275 (1946).

ARGUMENT

The Court's decision of August 27, 2003 was premised upon the failure of Congress to define the terms "injury" or "disease" in Title 38. ***Terry v. Principi***, No. 02-7416, Slip Op. p. 6. The Court concluded that Congress must be presumed to have intended to give these words their ordinary meanings because Congress had not directly spoken to the precise question at issue. ***Terry***, Slip Op. p. 6. Mr. Terry submits that the Court's decision overlooks the definition provided by Congress for the term "disability" in 38 U.S.C. § 1701(1). Mr. Terry asserts that the predicate for the award of service-connected compensation under 38 U.S.C. §§ 1110 and 1131 is based upon whether a veteran suffers from a "resulting disability." In light of the definition of "disability" provided by Congress, the premise of the Court's decision is flawed.

The Supreme Court noted in ***Brown v. Gardner***, *supra.*, that "injury" is employed elsewhere in the veterans benefits statutes as an instance of the neutral term "disability" appearing within a series whose other terms exemplify debility free from any connotation of fault. *See,* 38 U.S.C. § 1701(1) (2000) ("The term 'disability' means a disease, injury, or other physical or mental defect"). ***Gardner***, 513 U.S. at 118. Mr. Terry submits that the Court's focus upon the terms "injury" and "disease" were misplaced because Congress **did** define the term "disability" as used in 38 U.S.C. §§ 1110 and 1131. The special canons of construction for veterans benefits statutes require the consideration of the harmonious interplay of the statutory provisions and the intent of Congress. Thus, the scope of those conditions for which compensation to veterans would be paid for "resulting disabilities," is

expressed by Congress' definition of "disability" as meaning any "disease, injury, or other physical or mental defect." The meaning of statutory language, plain or not, depends on context. ***King v. St. Vincent's Hospital***, 502 U.S. 215 (1991) at 221. The cardinal rule is that a statute is to be read as a whole, *see* ***Massachusetts v. Morash***, 490 U.S. 107, 115 (1989).

The Supreme Court has observed that "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used . . . ***NLRB v. Federbush Co.,*** 121 F.2d 954, 957 (CA2 1941) (L. Hand, J.) (quoted in ***Shell Oil***, *supra*, 488 U.S. at 25, n. 6, 109 S.Ct. at 281, n. 6)." ***King***, 502 U.S. at 221. Mr. Terry contends that the meaning of "injury" and "disease," in sections 1110 and 1131 should be read in the context of the intent of Congress to provide compensation to veterans for post-service "**resulting disabilities**." It was incorrect for the Court to resort to the "ordinary meaning" of the terms injury and disease, rather than look to the context in which those terms were used in the statutes. The purpose or goal of 38 U.S.C. §§ 1110 and 1131 is to indicate that compensation will be provided by the government for "**resulting disabilities,**" from a "disease, injury, or other physical or mental defect," incurred in or aggravated by service.

Congress did define the term "disability" at 38 U.S.C. § 1701(1) as meaning a "disease, injury, or other physical or mental defect." The Court's decision concluded that sections 1110 and 1131 make it clear that if a disability cannot be attributed to an "injury" or a "disease" incurred or aggravated in the line of duty, the disability is not

compensable. ***Terry***, Slip Op. p. 6. The Court agreed with the Veterans Court in ***Winn v. Brown***, 8 Vet.App. 510 (1996), that Congress could not have intended to include every defect, infirmity and disorder within the scope of compensable disabilities. ***Terry***, Slip Op. p. 12. Yet, when Congress "for the purposes of section 1110," described the presumption of sound condition in 38 U.S.C. § 1111, Congress stated that every veteran shall be taken to have been in sound condition when examined for service, "except as to defects, infirmities, or disorders noted at the time of the examination." Congress thus explained that the presumption of soundness applies to "defects, infirmities, or disorders," by indicating that such conditions must be noted at the time of the entrance examination.

Therefore, the "harmonious interplay" and a "liberal construction" of 38 U.S.C. §§ 1110 and 1131 with 38 U.S.C. § 1111, required that the "resulting disability" in §§ 1110 and 1131 are found to be consistent with the definition of "disabilities" in § 1701(1). Congress intended to include **every** defect, infirmity, and disorder within the meaning of "disability." Additionally, when considering the whole statutory context, the intent of Congress is demonstrated in the language of 38 U.S.C. § 1153 in which Congress **does not** use either the term "injury" or "disease" but rather uses the term "disability" – that term having been defined by Congress to mean a "disease, injury, or other physical or mental defect." *See* 38 U.S.C. § 1701(1).

The Supreme Court has noted that veterans benefits legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. *See,* ***Boone v. Lightner***, 319 U.S. 561, 575, 63 S.Ct. 1223, 1231, 87 L.Ed. 1587. ***Fishgold v. Sullivan Drydock & Repair Corp.***, 328 U.S. 275 at 285 (1946).

Fishgold observed that our problem is to construe the separate provisions of the Act as parts of an organic whole and give **each** as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits. ***Fishgold***, 328 U.S. at 285. (Emphasis added) ***Fishgold*** reviewed a statute designed "to protect the veteran in several ways." ***Fishgold***, 328 U.S. at 284. But the interpretations made by the Secretary to exclude certain diseases and injuries from "resulting disabilities," is inconsistent with the organic whole and the liberal construction for the benefit of the veteran of the harmonious interplay of the separate statutory provisions.

The decision of the Court did not construe the separate provisions of the complete statutory scheme as parts of an organic whole and did not give to **each** as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits. Instead, the Court did as the Secretary had done in promulgating 38 C.F.R. § 3.303(c): it provided a narrow construction which discounted the interplay of the separate statutory provisions. The Court rejected as without merit Mr. Terry's argument "that an otherwise reasonable interpretation of a statute by the VA is impermissible if the statute is not liberally construed in favor of the veteran." ***Terry***, Slip Op. p. 9. In light of 38 U.S.C. § 1701(1) and ***Fishgold***, Mr. Terry's argument should be reconsidered by the Court.

CONCLUSION

Mr. Terry respectfully submits that the Court's decision failed to properly consider and apply the special canons of construction affirmed by the Supreme Court in ***Brown v. Gardner***, ***King v. St. Vincent's Hospital***, and

Fishgold v. Sullivan Drydock & Repair Corp., *all supra.* Based upon the foregoing arguments and authorities, Mr. Terry respectfully requests that the Court vacate its decision of August 27, 2003, and reconsider its opinion in this matter in light of the special canons of construction mandated by the Supreme Court of the United States for the interpretation of veterans benefits statutes.

Respectfully submitted,

Kenneth M. Carpenter, #08012
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P.O. Box 2099
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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the original and fifteen copies of the above and foregoing document has [sic] been shipped by overnight delivery to the Clerk and two copies to the below named counsel for Appellee on the 9th day of October, 2003, addressed to:

Maureen A. Delaney
Commercial Litigation Branch
Department of Justice
1100 L Street, N.W., Room 7000
Washington, D.C. 20530

Kenneth M. Carpenter

ADDENDUM

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* * *

Designated for electronic publication only

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 99-2197

JAMES J. TERRY, APPELLANT,

v.

ANTHONY J. PRINCIPI,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before STEINBERG, *Judge.*

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

The appellant, through counsel, seeks review of a September 30, 1999, decision of the Board of Veterans' Appeals (Board) that, inter alia, denied Department of Veterans Affairs service connection for presbyopia. Record at 3, 9. (Presbyopia is "hyperopia and impairment of vision due to . . . old age". DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1349 (28th ed. 1994).) In his brief, the appellant requested initial en banc review for the purpose of overruling the Court's holding in *Winn v. Brown*, 8 Vet.App. 510, 515-16 (1996), which upheld the validity of 38 C.F.R. § 3.303(c), a regulation that provides that "[c]ongenital or developmental defects, refractive error of the eye, personality disorders[,] and mental deficiencies as such are not diseases or injuries" for which a veteran may be awarded service connection, 38 C.F.R. § 3.303(c) (2001). Brief at 14. The Court denied that motion for initial full Court review, and the appeal is now before the single judge for consideration. The Court notes that the appellant makes no argument regarding five other claims in the

Board decision now on appeal; thus, the Court considers those claims abandoned as part of this appeal. *See Ford v. Gober*, 10 Vet.App. 531, 535-36 (1997); *Degmetich v. Brown*, 8 Vet.App. 208, 209 (1995), *aff'd*, 104 F.3d 1328 (Fed. Cir. 1997).

"Where there is an earlier panel or en banc opinion, we apply a rule that in a subsequent case, a panel or single judge may not render a decision which conflicts materially with such earlier panel or en banc opinion." *Bethea v. Derwinski*, 2 Vet.App. 252, 254 (1992). Because *Winn* upheld the validity of 38 C.F.R. § 3.303(c) and because the en banc Court in this case denied initial en banc review to revisit that opinion, the Court (at both the single-judge and panel levels) is now bound by *Winn* and must apply 38 C.F.R. § 3.303(c); the Court agrees with the parties that that regulation prohibits the award of service connection for the appellant's presbyopia because that condition is a refractive error of the eye.

On consideration of the foregoing, it is

ORDERED that the September 30, 1999, Board decision is AFFIRMED.

DATED: JUL 2 2002

BY THE COURT:

/s/ Jonathan R. Steinberg
JONATHAN R. STEINBERG
Judge

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